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IN THE

Supreme Court of the United States

OCTOBER TERM 1948.

No. 282

ST. LOUIS AMUSEMENT COMPANY, ST. LOUIS AMBASSADOR THEATRE, INC., EDEN THEATRE COMPANY, ST. LOUIS MISSOURI THEATRE, INC., FANCHON & MARCO SERVICE CORPORATION, JAMES H. ARTHUR, DAVID G. ARTHUR, EDWARD B. ARTHUR, THOMAS G. ARTHUR, HARRY C. ARTHUR, III, EDWARD L. MURPHY, *Petitioners*,

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, WARNER BROS. PICTURES DISTRIBUTING CORPORATION, AMERICAN ARBITRATION ASSOCIATION, HAROLD D. CONNOR, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This is a petition for a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Eighth Circuit, entered July 6, 1948, in the case of St. Louis Amusement Company et al. v. Paramount Film Distributing Corporation et al., No. 13502, affirming a judgment of

the District Court of the United States for the Eastern District of Missouri. (R. 325.)

SUMMARY STATEMENT OF THE MATTER.

Petitioner's sued respondents for treble damages and injunction for conspiracy in restraint of trade in violation of the antitrust laws. The complaint was filed October 25, 1944. (R. 2.) The action was dismissed on the ground that the restraint was authorized by a consent decree entered by the District Court for the Southern District of New York in *United States* v. *Paramount Pictures, Inc., et al.*, a case arising under the antitrust laws. That case was considered by this Court in an opinion delivered May 3, 1948. Petitioners here contended below that in so far as the decree was construed and used to bar an action by them for injunction and damages for violations of the anti-trust laws, it was void.

Petitioners are five corporations and one partnership, engaged in operating motion picture theatres in St. Louis. They operate first-run and subsequent run theatres at St. Louis, and depend on the distributor respondents for a necessary supply of pictures. (R. 2.)

Four of the respondents are engaged in the distribution of motion pictures. Two—the American Arbitration Association and respondent Connor, its agent in St. Louis—are engaged in adjudicating controversies among exhibitors relative to the terms and conditions upon which the distributors will license pictures to exhibitors, including petitioners, and in enforcing those adjudications. Three of the defendants in the District Court are exhibitors at St. Louis. Those defendants filed no motion, and therefore are not made respondents here. These three defendants and petitioners are independent exhibitors. They are in no way connected or affiliated with the respondent film companies.

The principal allegations of the complaint are (1) that the defendants are engaged in a conspiracy in restraint of trade; (2) as a part of which they have agreed to refuse to

sell pictures to petitioners except on terms and conditions established by the American Arbitration Association; and (3) that the defendants assert the concerted refusal is made legal by the consent decree. (R. 4, 7.)

These allegations are more fully stated as follows:

> 20. As a part of the combination and conspiracy American Arbitration Association, Harold D. Connor, Harry G. Erbs, and other officers and agents of American Arbitration Association who are unknown to plaintiffs, have arranged and agreed that they will receive complaints from exhibitors of motion pictures located in the several States, including St. Louis, Missouri, against and affecting other exhibitors, relative to the terms and conditions of contracts for motion pictures with the distributors and that they will make decisions and awards upon such complaints in accordance with a consent decree and rules of arbitration and appeal entered by the District Court of the United States for the Southern District of New York on November 20, 1940, in Civil Action No. 87-273, entitled *United States of America* v. *Paramount Pictures, Inc., et al.* (R. 5.)

The consent decree was entered November 20, 1940. It is printed in full at Record, page 28.

Practically the whole subject of the decree is the decision of controversies about clearances provided for in contracts for film between parties to that case and exhibitors who are not parties.

By the decree the American Arbitration Association is appointed "Administrator" of the system. (R. 52.) It is not a master in chancery or agent of the District Court.

As provided by the decree, the AAA has divided the country into thirty-one "judicial districts," and has established offices or courts in thirty-one principal cities, including St. Louis, for administering the system. By the decree the AAA is given the power to appoint and remove the "judges" and it has appointed a numerous adjudicating and clerical personnel for the trial of controversies described in the decree. An appellate court is established by the decree. (R. 5, 51, 53, 138.)

The AAA is given independent, exclusive, full and final jurisdiction of the controversies, there being no recourse at any stage to the District Court which entered the decree, as there would have been had the AAA the status of a master, referee or other agent of an equity court. (R. 134.)

That District Court has held that so far as it is concerned the AAA is wholly independent. On that principle, the District Court refused to entertain objections by an independent exhibitor to a decision of the AAA Appellate tribunal, on the ground that the jurisdiction of the court was "limited to a consideration of violations of the Sherman Anti-Trust Act by the defendants named as set forth in the pleadings, and remedies therefor, and can not be regarded as extending to an attempted proceeding in the District Court between an individual such as Sidney Lust Theatres and any of the defendants." (*United States* v. *Paramount Pictures, Inc., et al.*, Equity No. 87-273, unreported opinion of October 21, 1946.)

The decree creates new and pseudo causes of action for parties which are to be tried and enforced by the AAA courts and the defendants in the case in the New York District Court. Among such causes of action, all of which are unknown to the law, is included what may be called the Action of Clearance. The consent decree provides that

> Controversies arising upon the complaint of an exhibitor that the clearance applicable to his theatre is unreasonable shall be subject to arbitration . . . (R. 35.)

Clearance is provided for in contracts for pictures, and is an obligation upon the film company not to make the picture available for future exhibition until the expiration of the clearance period.

The decree does not state any of the elements of the Action of Clearance. It states no rules or principles of decision. It names seven "factors" which the arbitrator-judge shall consider, namely—

> In determining whether any clearance complained of is unreasonable, the arbitrator shall take into consideration the following factors and accord to them the im-

portance and weight to which each is entitled, regardless of the order in which they are listed:

(1) The historical development of clearance in the particular area wherein the theatres involved are located;

(2) The admission prices of the theatres involved;

(3) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(4) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut rate tickets, lotteries, etc.;

(5) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor defendant from such theatres;

(6) The extent to which the theatres involved compete with each other for patronage; and

(7) All other business considerations, except that the arbitrator shall disregard the fact that a theatre involved is affiliated with a distributor or with a circuit of theatres. (R. 35-36.)

It will be noted that while the arbitrator-judge is required to consider these factors, it is not indicated how they shall affect his decision.

The remedy and judgment to be awarded in a clearance case are stated in the decree as follows:

> The power of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the clearance complained of is unreasonable; and, if the finding be in the affirmative, (2) an award fixing the maximum clearance between the theatres involved which may be granted in licenses thereafter entered into by the distributor defendant which is a party to the arbitration. Subject to the provisions of Section XVII hereof, the award may fix such maximum clearance under any then existing franchise or any license entered into pursuant to such franchise between such distributor defendant and any other party bound by this decree. (R. 36.)

The decree provides that an award or "judgment" against an exhibitor shall be enforced by refusal of the dis-

tributors to furnish pictures except in accordance with the judgment. Distributors who furnish pictures on any other terms violate the decree and are subject to punishment for contempt. (R. 147.) In this regard the decree states—

> No consenting defendant and no officer, director, agent or employee of any such defendant, shall be deemed to have violated any provision of this decree if the arbitration of disputes or controversies arising relative to the subject matter thereof is herein provided for, unless such defendant has refused to arbitrate such a dispute or controversy in the manner and under the conditions specified in this decree and in the Rules of Arbitration and Appeals which are filed herewith, as amended from time to time, or has failed or refused to abide by and perform the final award made and entered in such an arbitration proceeding. (R. 47-48.)

Inasmuch as in ninety percent or more of the actual cases, two or more of the film companies were subject to the "judgments", the enforcement was by their uniform and simultaneous refusal to deal with respondents. (R. 239.)

The arbitration system, its courts and personnel are financed by the film companies. Its existence depends upon their contributions. The decree provides:

> 8. The expenses of the arbitration system shall be paid out of a fund administered by the Administrator. Such fund shall be established and maintained: by filing fees provided for by the Rules of Arbitration and Appeals; by penalties imposed in accordance with the provisions of Sections IV and V of this decree, and by such additional amounts, to be paid by the distributor defendants, as may be determined by the Budget Committee from time to time to be necessary. (R. 54.)

The budget for the first year is fixed by the decree at not to exceed $490,000, "except with the consent of a majority of the distributor defendants." The budget for the succeeding years is $465,000. This amount may be increased by an additional contribution of $50,000, and still further increased by filing fees and penalties collected. (R. 52-53.)

Thus, during the first three years the distributors have contributed not less than $1,420,000.

On February 3, 1943, the Apollo Theatre Corporation and Joseph Litvag filed a complaint with the American Arbitration Association at St. Louis to procure better clearance in contracts between the Apollo Theatre and Fox, RKO, Paramount and Vitagraph. (R. 5-6, 93.) Petitioner St. Louis Amusement Company was one of the exhibitors whose clearance was attacked and who would be adversely affected.

The decree does not require that exhibitors to be adversely affected by an award shall appear or be made parties. It is only necessary that they be named in the complaint filed with the AAA. Exhibitors are given the right to appear if they wish, but upon condition that they consent. If they do not appear it makes no difference. Present or absent, the proceedings are had and a judgment is reached and enforced for or against them. In this regard the Rules of Arbitration and Appeals state—

> Any exhibitor or distributor named either in the Demand or in any list filed by any defending party and any other exhibitor or distributor whose business or property may be affected by an award in the proceeding may, at any time prior to commencement of the first hearing, intervene and thereby become a party to the proceeding by filing with the Clerk of the Tribunal a statement which shall set forth his interest as an intervenor in the proceeding and a submission as provided in subdivision 9 of Section XXII of the Decree and by paying a filing fee of $10.00 to the Clerk of the Tribunal. (R. 61.)

Petitioner St. Louis Amusement Company filed a Declaration of Intervention and was admitted as an intervenor. (R. 93.) On August 5, 1943, respondent Harry G. Erbs, the St. Louis AAA judge, reduced the clearance from fourteen to seven days in favor of the Apollo Theatre. To enforce this judgment, Fox, RKO, Paramount and Vitagraph have

uniformly refused to make contracts with St. Louis Amusement Company on other terms. (R. 5-6.)

On August 10, 1944, Adolph Rosecan filed a complaint with the AAA at St. Louis to procure better clearance terms for the Princess Theatre. The complaint stated that the existing clearances to petitioners' theatres were "unreasonable". (R. 6, 94.) Paramount, RKO, Warner, Fox and Loew's were named as parties defendant. Petitioners were not named in the complaint, but their theatres were listed and designated as "involved in the controversy" (R. 95) and as theatres of exhibitors "whose business or property complainant believes may be affected by an award in the arbitration proceeding" (R. 95-96); in other words, theatres for which clearances in film contracts were to be reduced in favor of complainant.

On August 24, 1944, petitioners offered for filing in that action with the AAA a motion that the proceedings be terminated, on the ground that the jurisdiction which the AAA was exercising was violative of the Constitution and the Sherman Antitrust Act. (R. 7.) The AAA refused to receive the document, or to entertain or act upon the objection. (R. 7.)

Petitioners then turned to the District Court which entered the decree, and in September, 1944, filed a motion in the District Court for the Southern District of New York to intervene in *United States* v. *Paramount Pictures, Inc., et al.*, Civil Action No. 87-273. The purpose of the proposed intervention was to induce the Court to require the AAA to desist from proceedings concerning contracts between petitioners and the film companies, on the ground that the decree and the proceedings in that regard were violative of the Constitution and the Sherman Antitrust Act. The motion was argued and peremptorily denied. (R. 133, 147.) A direct appeal to this Court based on the Expediting Act, 15 U. S. C. A. section 29, was dismissed for want of jurisdiction on October 8, 1945. (326 U. S. 680.)

Meantime, on October 25, 1944, petitioners instituted the present action in the District Court at St. Louis, alleging

the facts herein stated. The complaint prayed for an injunction and treble damages in the amount of $285,000. (R. 2, 16, 18.)

Motions to dismiss and for summary judgment were filed, on the ground that the action complained of was provided for and required by the consent decree. (R. 25, 159, 163, 168.) Petitioners replied that the decree with regard to arbitration as applied to them was void for the reasons stated.

On August 6, 1945, the District Court handed down an opinion dismissing the complaint on the general ground that the District Court at New York had not exceeded its authority in creating and vesting powers in the AAA. *St. Louis Amusement Co.* v. *Paramount*, 61 F. Supp. 854. (R. 245.) The dismissal was affirmed by the Circuit Court of Appeals in an opinion delivered July 6, 1948.

While the appeal was pending in the Circuit Court of Appeals, the authority for the arbitration system was terminated by the District Court at New York, but not as to the two proceedings in this case. On December 31, 1946, that Court entered a decree stating that—

> The provisions of the existing consent decree are hereby declared to be of no further force or effect, except insofar as may be necessary to conclude arbitration proceedings now pending and to liquidate in an orderly manner the financial obligations of the defendants and the American Arbitration Association, incurred in the establishment of the consent decree arbitration systems. Existing awards and those made pursuant to pending proceedings shall continue to be enforceable. (Record in this Court in *United States* v. *Paramount Pictures, Inc., et al.*, Nos. 79-86, October Term, 1947; 66 F. Supp. 359.)

Petitioners thus remain exposed to the danger and loss stated in their complaint, because the existing award against St. Louis Amusement Company reducing clearance in favor of the Apollo Theatre continues to be enforceable and unchangeable, and the proceedings now pending to re-

duce clearance in favor of the Princess Theatre to the detriment of petitioners may be continued to a conclusion.[1]

On appeal to this Court from the decree entered by the New York Court, this Court held that the District Court had no power to force parties to submit to arbitration, saying in that regard—

> . . . the District Court has no power to force or require parties to submit to arbitration in lieu of the remedies afforded by Congress for enforcing the antitrust laws. But the District Court has the power to authorize the maintenance of such a system by those parties who consent and to provide the rules and procedure under which it is to operate. The use of the system would not, of course, be mandatory. It would be merely an auxiliary enforcement procedure, barring no one from the use of other remedies the law affords for violations either of the Sherman Act or of the decree of the court. (*United States* v. *Paramount et al.*, — U. S. — 68 S. Ct. 915, 938.)

JURISDICTION.

The jurisdiction of this Court is based on Title 28, Section 347 USCA (section 240 of the Judicial Code), authorizing review by certiorari of judgments of Circuit Courts of Appeal in civil cases.

THE QUESTIONS PRESENTED.

The questions arising on the facts in this case are:

1. Whether the creation by the District Court of the arbitration system was legislative?

2. If the creation of the arbitration system was not legislative, whether it was a delegation of the judicial power to the American Arbitration Association?

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[1] Although the District Court has granted no injunction against proceedings in the Princess Theatre arbitration case, the St. Louis arbitration office has taken no action since the filing of the complaint in the District Court on October 25, 1944.

3. Whether the uniform and simultaneous refusal of two or more of the respondent film companies to license pictures to petitioners in obedience to an award of the American Arbitration Association, is such conspiratorial action as is violative of the antitrust laws?

4. Whether the arbitration system is valid because it was contained in a consent decree and was agreed to by the law enforcing department and defendants in ostensible settlement of an antitrust case?

5. Whether the American Arbitration Association may lawfully resume and conclude the proceedings now pending against respondents except to enter an award dismissing the case?

REASONS FOR ALLOWANCE OF THE WRIT.

The writ should be granted and the judgment of the Circuit Court of Appeals should be reviewed and reversed by this Court because the questions are of great public importance, especially with regard to the administration of the antitrust laws and the preservation of the Constitutional tripartite division of Government in the United States. The importance of the case in this regard cannot be exaggerated. The case is of great importance to petitioners, to all other independent exhibitors of motion pictures, and, indeed, to all innocent parties in other fields who may be adversely affected by an unlawful restraint of trade. The District Court and the Circuit Court of Appeals have established a principle which will permit unlimited interference with the perfectly legal contracts of innocent parties, if guilty parties in an antitrust case engaged in the same business consent thereto, even though that interference has no tendency to dissipate the restraints. In other words, the judgments of the courts below are necessarily based on the proposition that an entire industry may be subjected to any system of regulation which the guilty parties and the law enforcing department may agree upon. And that regulation not only need not be limited to regulating the restrainers and monopolizers, nor be adequate to

neutralize and dissolve the unlawful power and combination, but instead may actually provide for a continuation and administration of the restraint and monopoly. That is the practical and legal effect of both judgments upholding the arbitration system in its application to petitioners. Though this basic proposition is not literally stated by those courts, it is by no means concealed or recondite in their written opinions. Thus, unless reversed, those opinions will be a source of much future mischief.

The writ should issue also because the opinions and judgments of the Circuit Court of Appeals and the District Court are in direct conflict with decisions of this Court; namely, *Paramount et al* v. *United States,* 282 U. S. 30, and *United States* v. *Paramount Pictures, Inc., et al.,* — U. S. —; 68 S. Ct. 915.

In the first case, in November 1930 this Court condemned as violative of the antitrust laws identically the same arbitration system. That was a suit brought against these respondents, dealing with an arbitration system to adjudicate disputes of exhibitors, operated by the same American Arbitration Association, in which the country was divided into numerous judicial districts in the same manner, with similar judicial tribunals in each district, and in which the judgments of the tribunals were enforced by the same collective refusal to furnish pictures. The parallel is complete.

In the second case, speaking of the very arbitration system in this case, which has been and will be applied to the petitioners, willy-nilly, this Court said—

> the District Court has no power to force or require parties to submit to arbitration in lieu of the remedies afforded by Congress for enforcing the antitrust laws. (68 S. Ct. p. 938.)

Thus it appears that this arbitration system was conceived many years ago by respondents and their associates, was condemned by this Court in 1930, and was nevertheless resurrected by them in 1940 and became the decree of the district court in lieu of an effective remedy.

IN THE

Supreme Court of the United States

OCTOBER TERM 1948.

No.

ST. LOUIS AMUSEMENT COMPANY ET AL., *Petitioners,*

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION ET AL., *Respondents.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the District Court is reported in 61 F. Supp. 854; R. 245.

The opinion of the Circuit Court of Appeals is reported at 168 F. 2d 988. It is printed at Record, page 315.

GROUNDS OF JURISDICTION.

In this case the Circuit Court of Appeals for the Eighth Circuit entered a judgment affirming a judgment of the District Court of the United States for the Eastern District of Missouri, granting motions to dismiss and for summary judgment in a case for injunction and treble damages under the Sherman Antitrust Act.

This Court has jurisdiction to review the judgment of the Circuit Court of Appeals by writ of certiorari by section 240, amended, of the Judicial Code (Title 28, section 347 U. S. C. A.)

STATEMENT OF THE CASE.

A statement of the case has been made in the petition, under the heading "Summary Statement of the Matter," p. 2.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred—

1. In affirming the judgment of the District Court.

2. In holding that the consent decree was not void in its application to petitioners.

3. In holding, in effect, that the consent decree was not void in requiring the film companies to refuse to furnish pictures to petitioners except in accordance with an award of the St. Louis arbitration tribunal.

4. In holding, in effect, that the District Court for the Southern District of New York had jurisdiction to create the arbitration system, had jurisdiction to enact pseudo law to be administered by it, had jurisdiction to create and confer judicial power upon the AAA and its agents as inferior tribunals, or more correctly, as supreme and independent tribunals, to administer that pseudo law, and had jurisdiction to apply the arbitration system to petitioners.

5. In holding, in effect, that the consent decree in establishing the arbitration system and applying it to petitioners was not void, because it was approved by the District Court for the Southern District of New York, and because it was agreed to by the law enforcing department and defendants ostensibly in settlement of an antitrust case.

SUMMARY OF ARGUMENT.

The creation of the arbitration system was an unconstitutional enactment of pseudo law, an unconstitutional creation of judicial power, an unconstitutional establishment of inferior courts, and an unconstitutional vesting of judicial power in those courts.

The arbitration system was not a remedy for the restraint and monopoly. It had no semblance to a remedy, and had no tendency to dissipate the violation of law, especially in its application to petitioners.

The fact that the arbitration system was approved by the District Court for the Southern District of New York in a consent decree agreed to by the law enforcing department and defendants ostensibly in settlement of an antitrust case, does not make it valid.

ARGUMENT.

The Creation of the Arbitration System by the District Court for the Southern District of New York, Was an Unconstitutional Enactment of Pseudo Law, the Creation of Judicial Power, the Establishment of Inferior Courts, or, More Correctly, Supreme and Independent Courts, and the Vesting of Judicial Power in Those Courts.

By the Constitution all legislative powers are vested exclusively in Congress. (*Constitution*, Art. I, sec. 1.)

The creation of courts is also a legislative power, also vested exclusively in the Congress. (*Constitution*, Art. III, sec. 1.)

The arbitration system enacted new rules and new liabilities. It does not provide for investigating, declaring and enforcing liabilities on past facts under pre-existing laws. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210.

The consent decree created new causes of action to be tried, decided and enforced by the AAA courts and the respondents. It created what may be called the Action of Clearance.

That the District Court was exercising not a judicial but a legislative function, is almost expressly stated in the decree, (1) in the statement that the decree is not an "adjudication" that the allegations upon which it is based are true or that they constitute a violation of law; and (2) in the statement that "this decree relates solely to future conduct." (R. 30.)

The awards or "judgments" which the AAA was authorized to make show the legislative character of the decree. Those "judgments" were of four kinds: (1) cancellation of contracts; (2) penalty of $500; (3) directing parties to offer pictures; (4) fixing, reducing and eliminating clearance. (R. 32, 33, 34, 36.)

The action of the District Court in terminating the arbitration system, after it had been in use for more than six years, indicates that the District Court finally recognized the legislative and illegal character of the system. It said—

> We cannot bind any parties to subject themselves to the arbitration system or the board of appeals set up in aid of it without their consent . . . (66 F. Supp. 323, 333.)

Although the District Court thus recognized that parties could not be bound without their consent, nevertheless the system had been in full operation during those years without that limitation, especially with regard to the petitioners.

Evidently this Court was of the same view as to the legislative character of the system, for it stated—

> . . . the District Court has no power to force or require parties to submit to arbitration in lieu of the remedies afforded by Congress for enforcing the antitrust laws. (*United States* v. *Paramount et al.*, — U. S. —; 68 S. Ct. 915, 938.)

The authority which the District Court has undertaken to vest in the AAA is an authority to perform judicial functions.

In re Saline County Subscription, 45 Mo. 52.
State v. *Hathaway*, 115 Mo. 36; 21 SW 1081.
Robey v. *Prince George's County*, 42 Md. 150; 48 Atl. 48.
34 *Corpus Juris*, p. 1178, sec. 2.

The District Court may not delegate judicial powers to an agency like the AAA, or even to its own clerk or to a master in chancery.

Meredith v. *People*, 84 Ill. 479 (Ill. Supreme Ct.)
Rouse v. *Thompson*, 228 Ill. 522 (Ill. Supreme Ct.)
12 *Corpus Juris*, p. 897, sec. 400.

It was beyond the jurisdiction of that court to disregard the Constitutional tripartite division of power.

Muskrat v. *United States*, 219 U. S. 346.
Taylor v. *Place*, 4 R. I. 324.
Vallely v. *Northern Fire & Marine Ins. Co.*, 254 U. S. 348.
United States v. *Walker*, 109 U. S. 258.
Ex parte Reed, 100 U. S. 13.
Elliott v. *Peirsol*, 1 Pet. 328.

It is not true that arbitration proceedings depend upon the consent of an adversely affected exhibitor. An exhibitor is permitted to appear, but present or absent the trial proceeds and a judgment is reached and enforced against him. Considering the fact that the arbitration system was conceived many years ago by the distributor respondents, was condemned by this Court in 1930 in *Paramount et al.* v. *United States*, 282 U. S. 30, and was nevertheless resurrected by them in 1940 and became the decree of the District Court in lieu of a remedy; and considering their possession and misuse of monopoly power and their proclivity to unlawful conduct in this field, of which the exhibitors have been the victims, any free consent by an exhibitor to arbitration proceedings is illusory. *United States* v. *Paramount*, 68 S. Ct. 915, 924.

The Fact That the Arbitration System Was Approved by the District Court for the Southern District of New York in a Consent Decree Agreed to by the Law Enforcing Department and Defendants Ostensibly in Settlement of an Antitrust Case, Does Not Make It Valid.

The District Court had jurisdiction only to "prevent and restrain" the violation of the antitrust laws stated in the complaint or shown in the evidence. Section 4 of the Sherman Anti-trust Act provides:

> The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act; . . . (26 Stat. 209.)

The District Court had no power to enter a decree which permitted the violation to continue, or which provided for the continuation and administration of the restraints, or which was without some tendency to dissipate the restraints.

United States v. *Standard Oil Co.*, 221 U. S. 1, 77-78.
United States v. *Bausch and Lomb*, 321 U. S. 706, 726.
United States v. *Crescent Amusement Co.*, 323 U. S. 173.

A decree under the antitrust laws may not invade the legislative field which belongs to Congress.

Hartford-Empire Co. v. *United States*, 323 U. S. 386.

The Federal Courts are courts of special and limited jurisdiction, and their action must be confined to the cases and parties over which the Constitution and statutes have authorized them to act.

Chisholm v. *Georgia*, 2 Dall. 432.
Mitchell v. *Clark*, 110 U. S. 633.
Rhode Island v. *Massachusetts*, 12 Pet. 657.

This jurisdiction may not be exceeded on the theory that a consent decree is a contract between the law enforcing de-

partment and defendants, and therefore may contain provisions limited only by their wishes and contractual capacity.

United States v. *Swift & Co.*, 286 U. S. 106.
United States v. *Socony-Vacuum Oil Co.*, 210 U. S. 150, 225.
United States v. *Dickson et al.*, 15 Pet. 141.

The decree did not touch the restraint and monopoly. It did not forbid the doing of the acts charged. It did not dissolve the combination. It did not neutralize the unlawful power of the defendants. It had no tendency in that regard.

The arbitration system was not a remedy for the restraint and monopoly. It had no semblance to a remedy, and had no tendency to dissipate the violation of law, especially in its application to petitioners.

The complaint in the case in which the decree was entered charged three principal means of effecting the restraint and monopoly: (1) concerted refusal to supply pictures to independent exhibitors, except upon terms concertedly established by the defendants; (2) the acquisition of theatres; and (3) divisions of territory among the defendants for exhibition of pictures. (R. 185-195, 200, 217, 221, 222, 229, 230, 231).

Independent exhibitors like petitioners are the conspicuous victims of the conspiracy stated in that complaint. The great burden of the complaint was a recitation of the injuries and restraints imposed on them. Amongst many restrictive practices which are stated is included a charge of concertedly fixing and enforcing terms and conditions as to clearance.

As to clearance, the complaint in that case alleges, using the synonymous term "protection":

> 116. In about 1930, after the producer-exhibitor defendants had substantially completed their theatre acquisition programs, they made a concerted effort to

establish uniform zoning and protection plans throughout the United States through the Film Boards of Trade. It was the purpose of these plans to establish in each exhibition territory a uniform plan of zoning and protection which would give a definite status to each theatre in the territory and which would prevent any distributor from dealing with such theatre with respect to run, zoning, or protection, on any terms other than those provided for in the plan. (R. 210.)

• • • • • • • • • •

117. In 1932 the United States District Court for the District of Nebraska held that the Uniform Zoning and Protection Plan for the Omaha Distribution Territory was an agreement between distributors which restrained trade in violation of the Sherman Act. After the illegality of these uniform zoning and protection plans became apparent in 1932, the distributors, refrained from employing any express agreements with each other with respect to uniform protection and zoning. (R. 211.)

There was no charge that the victims of the monopoly were the beneficiaries of improper clearances as amongst themselves. The charge was that the monopolizing film companies had unlawfully postponed the use of films by the independent exhibitors for the benefit of the theatres of the film companies.

The decree did not touch this evil. It merely provided a system by which, and tribunals before which, the injured exhibitors might quarrel among themselves about which of them should have what the combined film companies should choose to let them have.

Originally the provisions of the decree were of five classes, excluding introductory matter: namely, (1) a provision requiring the trade showing of pictures before licensing them for use, (R. 30-31); (2) a provision against requiring exhibitors to take shorts or other pictures with features (R. 31); (3) numerous provisions creating and stating the arbitration system, (R. 32-41, 47-48, 51-55, 59-72; 66 F. Supp. 331-332); (4) provisions relative to sup-

plying information to the Department of Justice (R. 42, 49-50); (5) provisions limiting the application of the arbitration system, and other provisions for suspension of provisions, and for postponing the right of the Government to seek an end to the restraint and monopoly by dissolution, all in favor of the defendants. (R. 43-46, 50-51; 66 F. Supp. 332-333).

By the terms of the decree, the trade showing and block booking provisions became inoperative as of September 1, 1942. (R. 30-31.) Since that time nothing has remained of the decree but the rule against forcing shorts, westerns and foreign pictures, and the arbitration system. In its administration the arbitration has been used to cut down the perfectly legal and short clearance which petitioner St. Louis Amusement Company was able to procure. It proposes to take like action in another case affecting all the petitioners.

The total inefficacy of that decree has been virtually affirmed by the Department of Justice, in an application for modification of the decree, in which the Department declared that

> Said decree is now inadequate to perform its intended function of restraining the violations of law alleged in the complaint and conforming the operation of the decree defendants to the requirements of the Sherman Act. (R. 19.)

Clearances committed to the pseudo jurisdiction of the AAA were not required to be tested by the standards of the antitrust laws, and in the proceedings in this case concerning the Apollo and Princess Theatres no such standards have been used. Now, however, in its approval of an arbitration system for the future based on consent, the District Court seems to indicate a requirement that the standards of the antitrust laws shall be applied. (66 F. Supp. 342-343.)

Under the arbitration system it was impossible for petitioners to determine what was a reasonable clearance. It

was impossible for them to make any contract for pictures however free from illegality, which could not later be pulled up by the roots by an arbitrator.

The same kind of trade regulation was condemned in *Schechter* v. *United States,* 295 U. S. 495, 541, 542, 553, in which the power in a government agency to make codes of "fair competition" was held to be an unconstitutional delegation of legislative functions.

See also

United States v. *Cohen Grocery Co.,* 255 U. S. 81.
Cline v. *Frink Dairy Co.,* 274 U. S. 445, 457.

How entirely remote was the arbitration system from a remedy for restraint of trade, monopoly or other actionable wrong, is disclosed in a brief filed by the respondents, in which they state that the purpose and practice of the arbitration judges was to "review the business judgment" of the parties to film contracts. The brief asserts—

> The arbitrators by the decree have been permitted to *review the business judgment of distributors and exhibitors* and to determine whether or not the clearance granted in particular cases was too long in point of time or too extensive in area, after weighing the several factors set forth in Section VIII. We will contend that it is apparent from the decisions that the members of the appeal board and the arbitrators have been assiduous in performing their duties and have provided adequate relief *wherever their judgment differed from the business judgment of the distributors and exhibitors which they reviewed.* (R. 243.) (Italics ours.)

The arbitration tribunals, judges and personnel were controlled by and subservient to the respondents. As has been shown, the system depended upon them for the financial means of subsistence, and the fines and fees collected accrued to the AAA. Where a judicial officer has an interest in the fines imposed, the proceeding is unconstitutional.

Tumey v. *Ohio,* 273 U. S. 510.

CONCLUSION.

It follows that the decree is void as a basis for the arbitration proceedings against petitioners, and that it ought not to have been accepted as a defense in the action in the District Court at St. Louis for injunction and damages.

It follows also that the American Arbitration Association may not lawfully resume and conclude the proceedings now pending against petitioners, as it shall be free to do unless the judgment of the Circuit Court of Appeals shall be reversed. In the light of the statement of the New York District Court that the arbitration system may be continued "insofar as may be necessary to conclude arbitration proceedings now pending", there is every reason to believe that the proceedings against petitioners will be resumed and will end in concerted, injurious action against them.

Petitioners have been forced to submit to the arbitration system, and the consent decree has been used to deprive them of remedies afforded by Congress, despite the statement of this Court in *United States* v. *Paramount et al.*, 68 S. Ct. 915, 938, that "the District Court has no power to force or require parties to submit to arbitration in lieu of the remedies afforded by Congress". Petitioners have been deprived of the right to have their contracts tested by the law of the land, of the right to make perfectly legal contracts for undisputedly perfectly reasonable, non-restrictive, non-monopolistic clearances. They will be further deprived of that right in pending proceedings before the St. Louis AAA "court". They have been denied a remedy by the District Court at St. Louis, again by the District Court at New York, and again by the Circuit Court of Appeals. Unless the judgment of the Circuit Court of Appeals shall be reversed by this Court, they will be totally and finally foreclosed.

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September 1948.

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Supreme Court of the United States

OCTOBER TERM, 1948

No. 282

ST. LOUIS AMUSEMENT COMPANY, ST. LOUIS AMBASSADOR THEATRE, INC., EDEN THEATRE COMPANY, *et al.*,

Petitioners,

vs.

PARAMOUNT FILM DISTRIBUTING CORPORATION, RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS PARAMOUNT FILM DISTRIBUTING CORPORATION, RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, and WARNER BROS. PICTURES DISTRIBUTING CORPORATION

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ALBERT C. BICKFORD,
GEORGE G. GALLANTZ,
of Counsel.

Supreme Court of the United States

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Opinions Below

The opinion of the District Court is reported at 61 F. Supp. 854. The opinion of the Court of Appeals for the Eighth Circuit is reported at 168 F. (2d) 988.

Jurisdiction

The petition for writ of certiorari was filed on September 16, 1948. Jurisdiction of this Court is invoked presumably under § 1254(1) of the new Title 28, United States Code, effective September 1, 1948.

Statement

The United States District Court for the Eastern District of Missouri granted summary judgment against the petitioners in an action brought by them under the Sherman Act. The Court of Appeals for the Eighth Circuit affirmed unanimously. The issue arose out of compliance by respondents and others with the arbitration provisions of the consent decree entered by the United States District Court for the Southern District of New York in 1940 in *United States* v. *Paramount Pictures Inc., et al.* A contested decree entered in 1945 in that case was recently reviewed by this Court (334 U. S. 131).

The petitioners are the operators of most of the first run theatres in downtown St. Louis and many of the first run neighborhood theatres. In all, they have 31 prior-run motion picture theatres in the City of St. Louis. Their petition presents a very narrow question, viz., whether several motion picture distributing companies, which were required by that consent decree to submit to arbitration certain kinds of controversies arising out of their business operations, are liable to suit under Section 1 of the Sherman Act for the sole reason that each of them has abided by the awards made in arbitration proceedings held pursuant to and in conformity with that decree. That question was carefully considered and decided in the negative by both lower courts. The decision sought to be reviewed is not in conflict with any decision of this or any other court. Indeed, it is in complete accord with and was adumbrated by the language and holding of this Court in *United States* v. *Paramount Pictures Inc., et al.* (334 U. S. 131 [1948]), and the Court of Appeals in affirming, so held.

a. The Consent Decree in *United States* v. *Paramount Pictures Inc., et al.*

Section II of the consent decree in *United States* v. *Paramount Pictures Inc., et al.* provided: "Each consenting defendant, its successors, officers, directors, agents and employees, and all persons and corporations acting under, through, or for it, hereby is and are enjoined from doing the acts prohibited by this decree, and is and are directed to do the acts thereby required" (R. 30). Thus the decree directed each defendant individually, and not jointly, to comply with its terms. Collective action was neither directed nor contemplated, as the Attorney General had occasion to emphasize when that suggestion was made on behalf of the petitioners (R. 147).

Specifically, the consent decree dealt, among other things, with the subject of "clearance", i.e., "the period of time, fixed by agreement between a distributor and an exhibitor, prior to the expiration of which a feature licensed for prior exhibition in a theatre may not be exhibited in another theatre or theatres (R. 35n; 334 U. S., at p. 144, note 6).

Section VIII of the consent decree provided that: "Controversies arising upon the complaint of an exhibitor that the clearance applicable to his theatre is unreasonable shall be subject to arbitration under the following provisions:

> "It is recognized that clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures" (R. 35).

Specific standards were set up in the decree to guide the arbitrators in determining whether clearance was reasonable. (R. 35-36). Section VIII also provided: "The power

of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the clearance complained of is unreasonable; and, if the finding be in the affirmative, (2) an award fixing the maximum clearance between the theatres involved which may be granted in licenses thereafter entered into by the distributor defendant which is a party to the arbitration" (R. 36).

Section XXII(1) of the decree provided that the procedure for the arbitration of such controversies was to be governed by a set of rules of arbitration attached to the decree (R. 51). Under the rules, any complainant demanding arbitration was required to name in his demand every exhibitor "whose business or property it is believed by the complainant may be affected by an award in the proceeding" (R. 60). The rules also contained provision for notice to such interested exhibitors and provisions entitling such exhibitors to intervene (R. 60-61). Section XXII(9) of the decree declared that any party so intervening should file a submission providing "that such intervenor submits to the arbitration and undertakes to abide by and to accept whatever final award may be entered therein" (R. 55).

The decree in Section VIII provided further: "Any distributor defendant or any exhibitor affected by such an award may institute a further arbitration proceeding for a modification thereof upon the ground that since the making of the award the conditions with respect to the theatres involved therein have so changed as to warrant modification, and, in the event that the arbitrator finds that there has been such change he shall make a redetermination of the maximum clearance" (R. 36-37).

The decree made decisions of the arbitrator subject to review by an Appeal Board and appointed the American

Arbitration Association—one of the respondents here—as administrator of the arbitration system (R. 52-53).

In 1944, the Government, as plaintiff in *United States* v. *Paramount Pictures Inc., et al.,* applied to the court for modification of the consent decree. Trial was had and on December 31, 1946 the court vacated the consent decree except in so far as necessary to conclude pending arbitration proceedings (66 F. Supp. 323; 70 F. Supp. 53). Together with its decree, the court filed a memorandum reading as follows (70 F. Supp., at p. 76):

> "The arrangement for arbitration and an appeal board has been terminated except as to unfinished litigations and other matters referred to in the decree, because of the unwillingness of some of the parties to consent to their continuance.* Nevertheless, as we have indicated in the opinion, these tribunals have dealt with trade disputes, particularly those as to clearances and runs, with rare efficiency, as both government counsel and counsel for other parties have conceded.
>
> "Indeed, the arbitration system set up under the consent decree of November 20, 1940, was created pursuant to the prayer of the amended and supplemental complaint by the United States filed November 14, 1940, in which, among other things, the plaintiff prayed that 'a nation-wide system of impartial arbitration tribunals or such other means of enforcement as the court may deem proper to be established pursuant to the final decree of this court in order to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained therein'.

*The non-consenting parties referred to were the Government, and Columbia, Universal and United Artists, none of which is a party to the case at bar.

> "We strongly recommend that some such system be continued in order to avoid cumbersome and dilatory court litigation and to preserve the practical advantages of the tribunals created by the consent decree."

Upon appeal from that decree, this Court made the following comments with respect to the arbitration system (334 U. S., at p. 176):

> "The consent decree created an arbitration system which had, in the view of the District Court, proved useful in its operation. The court indeed thought that the aribtration system had dealt with the problems of clearances and runs 'with rare efficiency'. But it did not think it had the power to continue an arbitration system which would be binding on the parties, since the consent decree did not bind the defendants who had not consented to it and since the government, acting pursuant to the powers reserved under the consent decree, moved for trial of the issues charged in the complaint. The District Court recommended, however, that some such system be continued. But it included no such provision in its decree.
>
> "We agree that the government did not consent to a permanent system of arbitration under the consent decree and that the District Court has no power to force or require parties to submit to arbitration in lieu of the remedies afforded by Congress for enforcing the anti-trust laws. But the District Court has the power to authorize the maintenance of such a system by those parties who consent and to provide the rules and procedure under which it is to operate. The use of the system would not, of course, be mandatory. It would be merely an aux-

iliary enforcement procedure, barring no one from the use of other remedies the law affords for violations either of the Sherman Act or of the decree of the court. Whether such a system of arbitration should be inaugurated is for the discretion of the District Court."

b. Arbitration Proceedings Affecting Petitioners' Theatres.

Petitioners operated a number of first- and other early-run motion picture theatres in the city of St. Louis. The films exhibited in these theatres were obtained under licenses from the respondent motion picture distributing companies and others. Prior to 1942, these licenses provided for clearance in favor of petitioner's theatres over certain subsequent run theatres in the neighboring area. The independent operators of certain of these other theatres claimed that petitioners' clearance over their theatres was unreasonably long, and therefore they demanded arbitration under the consent decree. During 1942, 1943 and 1944, three arbitration proceedings were instituted in which certain of petitioners' theatres were named as theatres which might be affected by the proceedings:

In *Matter of Adolph Rosecan,* Case No. 20-3F-42, Adolph Rosecan, on April 9, 1942, filed a demand for arbitration in the St. Louis Arbitration Tribunal asking that the arbitrator fix the maximum clearance between complainant's theatre and the immediate prior run (R. 99). The demand for arbitration stated that the Gravois Theatre in St. Louis, operated by the petitioner St. Louis Amusement Company, might be affected by the award. St. Louis Amusement Company voluntarily intervened in that proceeding, signed and filed an agreement to abide by and to comply with

the award of the arbitrator, and participated in the hearings (R. 101-106), and in the subsequent appeal (R. 96-98). The decision of the Appeal Board was handed down on October 15, 1942 and sustained the existing clearance which petitioner's Gravois Theatre had over the complainant Rosecan's theatre (R. 114-120).

In *Matter of Apollo Theatre Corporation,* Case No. 20-2F-43, a demand for arbitration was filed in the St. Louis Tribunal on June 10, 1943 by the operator of the Apollo Theatre, which asked for an award fixing the maximum clearance which might thereafter be granted by the distributors named in the demand to the theatres having the run next prior to that of the Apollo (R. 106). At that time the Pageant Theatre, operated by the petitioner St. Louis Amusement Company, was receiving 14 days' clearance over the Apollo. St. Louis Amusement Company again voluntarily intervened in this arbitration proceeding (R. 108). In intervening, it again exercised the right granted to it by Section XXII(9) of the consent decree, and in compliance therewith it again filed a formal submission to arbitration, and again undertook to abide by and to comply with the award (R. 110). It participated in the proceedings before the arbitrator and also took part in the subsequent appeal from the arbitrator's award (R. 96, 120-131). The Appeal Board decision (R. 120) prohibited the distributors who were parties (including the respondents here), from thereafter, in future licenses, granting more than 7 days' clearance to the Pageant over the Apollo. Petitioners' claim for treble damages is based solely on the compliance by each of the respondents with this award.

In *Matter of Adolph Rosecan, d/b/a the Princess Theatre,* Case No. 20-1F-44, Adolph Rosecan filed a de-

mand for arbitration on August 10, 1944 (R. 94). In his demand he asked for an award directing that the clearance between his theatre and all prior runs should be reduced, and named various theatres, including first run theatres in downtown St. Louis which are operated by one or more of the petitioners, as theatres which might be affected by the award. As appears from the complaint (R. 7), none of the petitioners intervened in that proceeding, but they did present to the American Arbitration Association at St. Louis a petition objecting to the proceedings, and requesting that they be terminated. When the present suit was before the District Court in 1945, no testimony had as yet been taken in that arbitration proceeding (R. 91) and, so far as we are presently advised, the complainant therein has not prosecuted his complaint. No damage has therefore been caused and it is only through indulging in the wildest speculation that it can be assumed that this proceeding is a threat of imminent and irreparable damage to any of the petitioners.

c. The Proceedings Below.

In the complaint, the activities of the defendant American Arbitration Association in complying with the consent decree in *United States* v. *Paramount Pictures, Inc., et al* are characterized as being part of a combination and conspiracy in violation of the Sherman Act (R. 5). The acts of the independent exhibitor defendants (who are not respondents here), in filing demands for arbitration under the consent decree, are characterized as a joining of this alleged combination and conspiracy (R. 5, 6). The respondent distributors' acts in abiding by the terms and conditions of

the awards are alleged to be illegal as part of the alleged conspiracy (R. 4-5).

The relief asked includes treble damages and a decree enjoining the defendants from participating in arbitration proceedings relative to claims affecting petitioners' theatres. The damage claim is based entirely on the award of the arbitrator in the *Apollo Theatre Corporation* case (R. 5-6, 18), the case in which St. Louis Amusement Company, the only one of the petitioners involved, voluntarily intervened in the arbitration and agreed to be bound by and to comply with the award.

The District Court granted respondents' motion for summary judgment, holding that the District Court for the Southern District of New York had not exceeded its powers in establishing the arbitration system, and held further that, as a matter of comity, it would not review the acts of the coordinate court which had entered the consent decree (R. 245-253).

The Court of Appeals affirmed (168 F. [2d] 988) and in its opinion distinguished *Paramount Famous Lasky Corporation* v. *United States,* 282 U. S. 30 (1930) upon the ground that there, the court had found a combination and conspiracy not to license pictures to exhibitors refusing to arbitrate, whereas here, the sole basis of the complaint was the fact that the distributors had individually consented to be bound by a decree of a United States District Court (168 F. [2d], at p. 990). The Court of Appeals went on to quote from the language of this Court in *United States* v. *Paramount Pictures Inc., et al.,* and to point out that arbitration awards under the decree had not affected rights under existing contracts and are no bar to the exercise of any right under the Sherman Act.

> "But, as we have indicated, the refusal, during the time the consent decree was in effect, of such dis-

tributors as had been party to an arbitration proceeding on a clearance period, under a complaint filed by some exhibitor, of which plaintiffs were given notice and had an opportunity to intervene, to agree with plaintiffs on a longer clearance against the theatre of the complaining exhibitor than that fixed in the arbitration award, could not, without more in the situation, in view of the prohibition of the decree, be claimed to constitute an actionable combination or conspiracy under the statute" (168 F. [2d], at p. 992).

Summary of Argument

The District Court had power to authorize arbitration by motion picture distributors who consented to it. While arbitration could not be made mandatory in the absence of consent, its authorization by a court would be meaningless unless those consenting could respect and comply with the awards of the arbitrators without violating the law and exposing themselves to the danger that their mere act of compliance would lay them open to suits under the Sherman Act. The establishment of the arbitration system did not involve any abdication of the District Court's constitutional judicial power. It merely established "an auxiliary enforcement procedure, barring no one from the use of other remedies the law affords for violations either of the Sherman Act or of the decree of the court" (334 U. S., at p. 176).

Petitioners here, however, did not choose to pursue other remedies and voluntarily became party to and participated in the only arbitration which has resulted in an award prescribing the maximum clearance which one of their theatres could thereafter enjoy over its competitors. They cannot, therefore, be heard to complain of the respondents'

compliance with that award. In no other arbitration proceeding have any of the petitioners been affected. The injunction sought against the inception of any such proceeding would, if granted, emasculate the arbitration system.

It is well settled that broad consent decrees are within the power of courts which have jurisdiction of equity suits to enjoin violations of the anti-trust laws. The consent decree here questioned is not subject to collateral attack upon the ground that the Attorney General erred in consenting to it or upon any of the other grounds asserted by petitioners.

ARGUMENT

I.

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK HAD POWER TO ENTER THE CONSENT DECREE AND TO AUTHORIZE ARBITRATION. PETITIONERS MAY NOT PREDICATE A CAUSE OF ACTION UPON RESPONDENTS' COMPLIANCE WITH THAT CONSENT DECREE.

The complaint in this action falls logically into two subdivisions. In the first, one of the petitioners, St. Louis Amusement Company, claims to have suffered damages from an award in an arbitration proceeding to which it voluntarily became a party and in which it fully participated and agreed to be bound by the result. Although the arbitration system provided it with a forum in which to seek a modification of the award (consent decree, Section VIII, quoted *supra*, p. 4), there is no allegation in the com-

plaint that it availed itself of this relief, and the fact is that is did not. The other petitioners were not and could not have been affected as, so far as the record shows, they had no legal interest in the theatre involved.

In the second, the petitioners' theory is that they are entitled to an injunction against an arbitration proceeding in which the arbitrator has as yet taken no steps other than to receive a complainant's demand for arbitration and to schedule the complaint for a hearing. Although the hearing was scheduled to take place some three years ago, the complainant has not pressed it and it has not been held.

In passing on both theories of the complaint, the Court of Appeals correctly looked to the decision of this Court in *United States* v. *Paramount Pictures Inc., et al.,* 334 U. S. 131 (1948). In that case, the Court had before it some phases of the very consent decree which is here involved. One of the questions before this Court was whether the District Court in New York had the power to authorize arbitration by those consenting to it. The Court squarely held that the District Court had such power, and thus disposed of the contention now made by the petitioners that authorization of the arbitration system was beyond the power of the court.

In so holding, this Court also noted that the use of the system was not mandatory, and that the consent decree barred no one from the use of other remedies afforded by the anti-trust laws. It, of course, did not suggest what is now suggested by the petitioners: that compliance with the awards of the arbitrators, individually by each distributor against whom the award was made, constitutes a conspiracy giving rise to additional and new remedies under the anti-trust laws.

Since, as this Court held, the arbitration system could be lawfully established, it follows that the awards of the arbitrators must be binding on all those who submit to their authority and who participate in the proceedings before them. The language and holding of this Court would be meaningless if those who seek to take advantage of the proceedings before these tribunals could then assert that compliance with the impartial award which resulted from those very proceedings was a basis for a charge of conspiracy in violation of the Sherman Act.

These respondents have never contended, and the courts below did not hold, that petitioners were required to make use of the arbitration procedure or that the availability of the procedure deprived them of the use of other remedies. The system, however, having been lawfully created, the arbitrators must be permitted to entertain complaints under the provisions of the consent decree and to proceed to an impartial determination of the merits of these complaints. Yet the petitioners—apparently anticipating an adverse decision on the merits—would have this Court permanently enjoin the operation of the system at its inception. And that result is sought to be justified merely because it is probable that the respondent distributors will abide by any award made by the arbitrators. To permit the system to be established without permitting the distributors to abide by these awards would render the entire process nugatory and it is fair to assume that that was not the intent of this Court when it discussed arbitration in the *Paramount Pictures* case.

It should also be remembered that the entire question of whether a method of arbitration should be permanently established is now before the statutory three-judge District

Court in New York under this Court's remand. The opinion in the *Paramount Pictures* case expressly left that question to the trial court's discretion. This furnishes another reason for denying the writ now sought by the petitioners. The entire purpose of this Court's remand on this question would be subverted if, by means of this collateral attack on the power of the District Court, the operation of the arbitration system were to be enjoined.

Even before the *Paramount Pictures* case had reached this Court, District Judge Duncan, in granting the respondents' motion for summary judgment in the court below, refused, on the grounds of comity, to interfere with the operation of the consent decree entered by the District Court in New York (R. 250), citing *Torquay Corporation* v. *Radio Corporation of America,* 2 F. Supp. 841 (SDNY, 1932). As to this proposition, see also *Chicago Pneumatic Tool Co.* v. *Hughes Tool Co.,* 61 F. Supp. 767 (D. C. Del., 1945), aff'd on other grounds, 156 F. (2d) 981 (CCA 3, 1946), cert. den., 329 U. S. 781 (1946); *In re Sierra Salt Corporation,* 8 F. Supp. 922, 925 (D. C. Nev., 1934); *The Don,* 1 F. Supp. 353 (DCNJ, 1932).

While, in our view, considerations of comity were in themselves sufficient ground for the decisions of the courts below, those considerations are now reinforced by the fact that the District Court in New York must now, under the mandate of this Court, consider anew the entire question of establishing an arbitration system, and it would seriously hamper its deliberations if this suit questioning its powers and seeking to enjoin compliance with its earlier direction, were still pending in Missouri.

II.

CONSENT DECREES GENERALLY ARE NOT SUBJECT TO COLLATERAL ATTACK UPON THE GROUND THAT THE ATTORNEY GENERAL ERRED IN CONSENTING TO THEM OR UPON ANY OF THE OTHER GROUNDS ASSERTED BY PETITIONERS.

In their approach to the issues raised by this petition for a writ of certiorari, the petitioners persist in refusing to accord proper weight to the vital fact that the consent decree here in question was approved by the chief law enforcement officer of the Government.

Although consent may not broaden the jurisdiction of a court, it permits the court to approve relief within that jurisdiction which it might otherwise be unwilling or unable to grant without consent.*

Petitioners' complaint (R. 8) attacks, and their brief challenges, the consent decree because of its alleged failure to prevent the restraints alleged in the Government's complaint and, instead, as it is asserted, authorizes and requires the respondents to engage in a conspiracy and in unlawful restraint.

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*An illustration of this distinction is furnished by the unwillingness of the Supreme Court in *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 413-417 (1945), where a consent decree was not before it, to grant compulsory royalty-free licenses, as the Government had requested. Yet Federal courts have repeatedly approved consent decrees containing such a provision. See *United States and Alien Property Custodian* v. *Merck & Co. Inc., et al.* (D. C. N. J. Oct. 1945) C. C. H. Trade Reg. Serv., 1944-47 Supp. Par. 57,416; *United States* v. *Auditorium Conditioning Corp. et al.* (S. D. N. Y. Dec. 1945), C. C. H. Trade Reg. Serv., 1944-47 Supp. Par. 57,428.

These allegations not only are untrue, but they point up the essential difficulty with the maintenance of this action, and show that it is a collateral attack upon the validity of a decree of a court of coordinate jurisdiction. In so far as the petitioners challenge the efficacy of the decree, they are merely asserting a difference between their opinion and the opinion of the District Court in New York and the Attorney General as to what relief was appropriate at the time the decree was entered. But the Sherman Act charges the Attorney General and the court, and not the petitioners, with the responsibility of making that decision, and *Swift & Co.* v. *United States,* 276 U. S. 311 (1928) puts a decree entered upon consent of the Attorney General beyond such criticisms of inadequacy. Even were the criticisms well founded, or if the Attorney General had subsequently changed his mind, the consent then given was definitive at least until proceedings to vacate or modify the decree were brought. A consent decree is not void because another Attorney General or a citizen would have preferred a different method of treatment or cure.

The consent decree, entered by a court which had jurisdiction of both the parties and subject matter contains provisions directly related to the charges in the Government's complaint. Its entry, as the court below properly found, was plainly an exercise of the court's jurisdiction to prevent violations of the Sherman Act.

In the *Swift* case the court squarely held "that an injunction may issue to prevent future wrong, although no right has yet been violated" (p. 326) and that there need be no findings of facts showing violations of the anti-trust laws as a condition precedent to the entry of a valid consent decree (p. 327).

The further contention was made in the *Swift* case, and the same argument is again made here, that the consent decree was void because it obliged the defendants to abandon completely certain businesses and methods of doing business, which were not inherently unlawful, and that such a decree was not merely unauthorized, but was contrary to the common law and the Anti-Trust Act (p. 330). The court rejected that contention saying:

> "* * * But the court had jurisdiction of the subject matter and of the parties. And even gross error in the decree would not render it void. Compare *Ex parte Watkins,* 3 Pet. 193; *Ex parte Parks,* 93 U. S. 18; *In re Coy,* 127 U. S. 731, 756" (p. 330).

In the *Swift* case it was further argued that the power to issue an injunction was limited by the scope of the transactions prohibited by Sections 1, 2 and 3 of the Anti-Trust Act (p. 329), and that the decree was void because the Attorney General had no power to agree to a decree by which citizens of the United States were prohibited absolutely and forever from engaging in lawful businesses (p. 331). These contentions, inherent in petitioners' arguments here, were all rejected by this Court (276 U. S. 311, 329, 331-2). The *Swift* decision thus furnishes a complete answer to petitioners' contentions with respect to the consent decree attacked here. Its validity is beyond question and the courts below were bound to dispose of this case as they did.

There appears to be a suggestion in the petitioners' brief to the effect that the consent decree and the arbitration system affects the terms of existing contracts. That contention was fully treated by the Court of Appeals (168 F. [2d], at pp. 991-992). The Court of Appeals there quoted

from Section VIII of the consent decree, the language which we have quoted *supra,* pp. 3-4, and concluded that: "It was not possible therefore to touch rights under existing contracts and, as the opinion of the Supreme Court points out, there was no bar to the exercise of any right under the Sherman Act for wrongs which had been done."

While the power of a court under the Sherman Act to disregard, under certain circumstances, the letter and legal effect of contracts in order to achieve the purposes of the law, cannot be questioned (*Continental Co.* v. *United States,* 259 U. S. 156, 171 [1922]), the record here is entirely clear that the arbitrators had no power to interfere with the terms of existing contracts, and that they never did interfere or threaten to interfere with such contracts. That suggestion of the petitioners is therefore also wholly without merit.

CONCLUSION

For the reasons indicated, the petition for a writ of certiorari raises no questions which merit consideration by this Court, and it should be denied.

Respectfully submitted,

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October 6, 1948.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 282

ST. LOUIS AMUSEMENT COMPANY, ST. LOUIS AMBASSADOR THEATRE, INC., EDEN THEATRE COMPANY, ST. LOUIS MISSOURI THEATRE, INC., FANCHON & MARCO SERVICE CORPORATION, JAMES H. ARTHUR, DAVID G. ARTHUR, EDWARD B. ARTHUR, THOMAS G. ARTHUR, HARRY C. ARTHUR, III, EDWARD L. MURPHY,

—v.— *Petitioners,*

PARAMOUNT FILM DISTRIBUTING CORPORATION, RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, WARNER BROS. PICTURES DISTRIBUTING CORPORATION, AMERICAN ARBITRATION ASSOCIATION, HAROLD D. CONNER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF ON BEHALF OF RESPONDENTS, AMERICAN ARBITRATION ASSOCIATION AND HAROLD D. CONNER

S. MAYNER WALLACE,
Counsel for Respondents, American Arbitration Association and Harold D. Conner.

WESLEY A. STURGES,
EDWIN FOSTER BLAIR,
Of Counsel.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF ON BEHALF OF RESPONDENTS, AMERICAN ARBITRATION ASSOCIATION AND HAROLD D. CONNER

Opinions Below

The opinion of the Court of Appeals for the Eighth Circuit (R. 315-323) is reported in 168 F. (2d) 988. The opinion of the District Court (R. 245-253) is reported in 61 F. Supp. 854.

Jurisdiction

Presumably the jurisdiction of this Court is invoked pursuant to §1254(1), United States Code, new Title 28. The petition for a writ of certiorari was filed on September 16, 1948.

Statement of the Case

This action by petitioners under the Sherman Anti-Trust Act, 15 U. S. C. A. §1 *et seq.*, was brought in the United States District Court for the Eastern District of Missouri. On motion of the respondents the District Court granted summary judgment against the petitioners, and this judgment has been unanimously affirmed by the Court of Appeals for the Eighth Circuit.

In substance, the petitioners' complaint alleged a combination and conspiracy and predicated the same solely upon the actions of respondents in complying with the arbitration provisions of a certain Consent Decree entered on November 20, 1945, by the United States District Court for the Southern District of New York, in Civil Action No. 87-273 entitled *United States of America* v. *Paramount Pictures, Inc., et al.* (R. 4; 28). This Court in 334 U. S. 131 recently considered the contested decree subsequently arising out of that litigation.

The petitioners' complaint herein concerns those provisions of the above mentioned Consent Decree dealing with the establishment of an arbitration system on matters of "clearance", which is the period of time which must elapse between runs of the same motion picture within a particular area or in specified theatres. The petitioners, who operate theatres in St. Louis, Missouri, alleged in their complaint that respondents by refusing to license films in particular cases other than on the basis of awards made by respondent American Arbitration Association entered into a combination in violation of the Sherman Act.

Respondent American Arbitration Association was appointed Administrator of the arbitration system established by the Consent Decree. As authorized by Subsection 2 of Section XXII of the Decree (R. 51), respondent Harold D. Conner was appointed by the Association as Clerk of the Motion Picture Arbitration Tribunal for the St. Louis Arbitration District. Petitioners claim that respondents American Arbitration Association and Conner by consenting to receive complaints from exhibitors on clearance questions and to make awards on such complaints, took part in the alleged combination.

The basic issue raised by the respondents' motions for summary judgment was whether they could be subjected to suit under the Sherman Act where the only acts in the alleged conspiracy consisted of their doing and arranging and agreeing to do exactly the things which they were authorized, and indeed directed, to do by the Consent Decree.

The motions of respondents for summary judgment were granted by the District Court on the ground that the Consent Decree was a valid subsisting decree and that as a matter of comity and of the orderly administration of jus-

tice that Court would refuse to review the decree of a court of coordinate jurisdiction (R. 245).

The Court of Appeals for the Eighth Circuit unanimously affirmed the judgment of the District Court on the basis that the agreement by respondents to the setting up of an arbitration system under the Consent Decree and their commitment in that Decree to abide by any final award in an arbitration proceeding conducted under that system, did not constitute a violation of the Sherman Act. In its opinion the Court of Appeals relied extensively upon the opinion of this Court in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 176.

The matter on which review is sought herein presents no question of public importance and involves no point in the administration or interpretation of the anti-trust laws which has not already been fully passed upon by this Court. In fact, as is indicated in the opinion of the Court of Appeals for the Eighth Circuit, that Court's decision was based on this Court's recent opinion in *United States* v. *Paramount Pictures, Inc., supra.*

Summary of Argument

The Consent Decree entered by the United States District Court for the Southern District of New York was a valid exercise of judicial power, and any question of its validity is now foreclosed by this Court's decision in *United States* v. *Paramount Pictures, Inc., supra.* If the full purport of this Court's decision in the *Paramount Pictures* case is to be realized, then it follows that the actions of the respondents within the framework of the Consent Decree constitute no actionable wrong under the Sherman Act.

This action, brought in defiance of the rules of comity, constitutes a collateral attack upon the validity of a decree

of a court of coordinate jurisdiction and cannot be maintained.

The United States is an indispensable party to the action and was not joined as a party defendant. The Consent Decree here under attack was the result of a suit brought by the United States to enforce the federal anti-trust laws and was entered pursuant to agreement with, and on motion of, the United States. The United States, therefore, had a primary and vital concern in the operation of the Consent Decree not only because it was a party thereto, but also because such Decree constituted an instrument of the Government for the enforcement and administration of the federal anti-trust laws.

ARGUMENT

I

The Consent Decree entered by the United States District Court for the Southern District of New York was a valid exercise of judicial power.

In the light of this Court's decision in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, it cannot be disputed that the Consent Decree attacked herein was a valid judicial act. The basis of the petitioners' case is the allegation that the Consent Decree was void. The Court of Appeals for the Eighth Circuit awaited the decision of this Court in the *Paramount Pictures* case and then summarily disposed of petitioners' claims by reference to this Court's opinion in that case.

Petitioners make no claim that the District Court for the Southern District of New York, in entering the Consent Decree, did not have jurisdiction of the subject matter and of the parties. The use of consent decrees as a valid instrument in the administration of the anti-trust laws has long been established. When a court, with jurisdiction of the subject matter and of the parties, enters a consent decree, even gross error does not render such decree void. *Swift & Company* v. *United States*, 276 U. S. 311, 330. The validity of the Consent Decree here under consideration cannot, therefore, be questioned.

With the validity of the Consent Decree established, the validity of the arbitration system and of the actions of the participants under and in accordance with the terms of that Decree is a matter on which there should be no dispute. Far from being considered invalid, the arbitration system

has been approved by all courts concerned as an efficient and useful means of settling clearance disputes among exhibitors of motion pictures.

Although the arbitration system under the Consent Decree was, of course, "an auxiliary enforcement procedure" which was terminated by the final decree in *United States* v. *Paramount Pictures, Inc.*, 60 F. Supp. 323 (D. C., S. D. N. Y., 1947), because of the failure of certain of the parties to consent to its continuance, the three-judge statutory court strongly recommended that "some such system be continued in order to avoid cumbersome and dilatory court litigation and to preserve the advantages of the tribunals created by the Consent Decree" (70 F. Supp. 53, 76). That Court also stated (60 F. Supp. 323, 333) that the arbitration system had been of "demonstrated usefulness", and, in its Findings of Fact (70 F. Supp. 53, 76), characterized the system as having been conducted with "rare efficiency", particularly in the handling of clearance matters. This Court also indicated its approval of the system and, at the present time, the question of its establishment on a permanent basis is being considered by the statutory three-judge court in the Southern District of New York under this Court's remand of the case (334 U. S. 131, 176).

Under the Consent Decree the respondents American Arbitration Association and Harold D. Conner had limited authority in settling clearance disputes, and there is no question of their having imposed arbitration on any one without his consent. As to their function within the arbitration system, Section VIII of the Decree (R. 36) defined their power as follows:

> "The power of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the clearance complained of is

unreasonable; and, if the finding be in the affirmative, (2) an award fixing the maximum clearance between the theatres involved which may be granted in licenses thereafter entered into by the distributor defendant which is a party to the arbitration."

In acting within the framework of the Decree—and there is no claim that they acted otherwise—these respondents were operating under the mandate of the United States District Court for the Southern District of New York. The petitioners claim that the respondent distributors by refusing to license petitioners except in accordance with an arbitration award subjected themselves to penalties under the Sherman Act. However, the action of respondent distributors under the Decree could not constitute actionable wrong under the Sherman Act. In fact, if they had licensed petitioners in violation of an arbitration award they would have subjected themselves to possible contempt proceedings under the Decree. Likewise the actions of the respondents American Arbitration Association and Harold D. Conner as ministerial agents of the New York District Court under the Decree could not constitute any actionable wrong, and the decision of this Court in the *Paramount Pictures* case fully supports this conclusion.

II

The action was brought in defiance of the rules of comity.

A further ground for the decision below was that relied on by the District Court, namely that this action was improper, since it had been brought in the Eastern District of Missouri in defiance of the rules of comity, which forbid a court from passing upon a valid decree rendered by a court of coordinate jurisdiction within the federal judicial system. Such collateral attack as was here attempted upon the validity of a decree of such a court of coordinate jurisdiction cannot be maintained.

The principle of comity requires that a court should, in furtherance of orderly process in the administration of justice and the conclusion of litigation, give effect to the judicial decisions of another court of coordinate jurisdiction. *United States ex rel. Skinner & Eddy Corporation* v. *McCarl*, 8 F. (2d) 1011 (Ct. of Appeals, Dist. Columbia, 1925); *Refior* v. *Lansing Drop Forge Co.*, 134 F. (2d) 894 (CCA 6th, 1943); *Carbide & Carbon Chemicals Corporation* v. *United States Industrial Chemicals, Inc.*, 140 F. (2d) 47 (CCA 4th, 1944).

In *Torquay Corporation* v. *Radio Corporation of America*, 2 F. Supp. 841 (D. C., S. D. N. Y., 1932), the Court declined jurisdiction on the basis of this principle because the relief sought would, if granted, be equivalent to a modification of the consent decree theretofore entered by a different federal court.

This established rule was correctly applied in this case by the District Court, since respondents in bringing this action were in effect attempting to use the District Court

for the Eastern District of Missouri as an appellate court to review a decree of the District Court for the Southern District of New York. No such powers of review have, of course, been vested in any federal district court by the Constitution or by any law of the United States.

III

The United States, an indispensable party to this action, was not joined as a party defendant.

Still another ground for the decisions below, which neither lower court found it necessary to mention, is that the District Court lacked jurisdiction over this action because the United States was an indispensable party thereto and was not joined as a party defendant.

The Consent Decree here under attack was the result of a suit brought by the United States to enforce the federal anti-trust laws, and the Decree specifically recites that it was entered pursuant to agreement with, and on motion of, the United States (R. 29). The United States, therefore, had a primary concern in the continued operation of the Consent Decree, not only because it was a party thereto, but also because such Decree constituted an instrument of the Government for the enforcement and administration of the anti-trust laws. See *Torquay Corporation* v. *Radio Corporation of America, supra.*

No party in the instant action is authorized or competent to assert or defend the interest of the United States in the Consent Decree. The United States was, therefore, an indispensable party here.

CONCLUSION

The petition for the writ of certiorari should be denied.

Respectfully submitted,

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